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In the Supreme Court of the United States

OCTOBER TERM, 1983

BRADLEY THOMAS PFEIFER AND
DIANE RENE PFEIFER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Case:

United States v. *Jacobsen*, 683 F.2d 296, cert. granted, No. 82-1167 (Mar. 7, 1983) 2, 3, 4

Statutes:

18 U.S.C. 4205(b)(2) 2

21 U.S.C. 841(a)(1) 2

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Petitioners contend that evidence seized from their residence pursuant to a warrant should have been suppressed because the affidavit supporting the warrant reflected the results of a warrantless chemical analysis of cocaine shipped to their residence.

1. A man identifying himself as Miroslav Heran brought a package to an office of Federal Express, a private freight carrier, in Fort Lauderdale, Florida. The package was addressed to petitioners' residence in San Diego, California. The label on the package stated that it had been shipped by Induvet International. Pet. App. 2.

Robert Crump, a Federal Express security manager in Fort Lauderdale, became suspicious of the package and looked up Miroslav Heran and Induvet International in a

local telephone directory. When he found neither name listed, he opened the package. The standard Federal Express contract, filled out by every shipper, provides that Federal Express may open a package and inspect it. Pet. App. 2-3.

Inside the package, Crump found a plastic bag containing a white powder surrounded by feathers. Crump believed the powder to be cocaine, and he accordingly notified the Drug Enforcement Administration. The DEA told Crump to send the package to San Diego, where DEA Agent Lough reopened the package and removed and tested a small quantity of the powder. The test confirmed that the powder was cocaine. Pet. App. 3.

The DEA then obtained a search warrant for petitioners' residence. A Federal Express employee delivered the package and, an hour later, DEA agents executed the warrant. They found the cocaine, other drugs, drug paraphernalia, cash, and papers reflecting narcotics transactions. Pet. App. 3. Petitioners unsuccessfully sought to have this evidence suppressed and, after a bench trial in the United States District Court for the Southern District of California, were each convicted on one count of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2. Petitioner Bradley Pfeifer was sentenced to two years' imprisonment under the provisions of 18 U.S.C. 4205(b)(2) and a five-year special parole term. Petitioner Diane Pfeifer was sentenced to two years' imprisonment, all but 120 days of which was suspended; three years' probation; and a three year special parole term.

2. As petitioners note (Pet. 7), the facts of this case are very similar to those of *United States* v. *Jacobsen*, 683 F.2d 296 (8th Cir. 1982), cert. granted, No. 82-1167 (argued Dec. 7, 1983). The question presented in *Jacobsen* is whether a law enforcement officer must obtain a warrant before taking actions like those of Agent Lough in this case.

But however the question presented in *Jacobsen* is resolved, petitioners are not entitled to relief. That is because the court of appeals in this case specifically held that even if the evidence produced by Agent Lough's actions had not been included in the affidavit supporting the search warrant, that affidavit would have established probable cause. As the court of appeals explained (Pet. App. 5-7 (footnote omitted)):

> Lough's affidavit in support of the search warrant set forth the information furnished to Lough by Crump concerning the circumstances of Crump's search and its results. Because the search was private, the issuing magistrate could properly consider that information. The affidavit recited at considerable length the underlying facts and circumstances on which Crump based his conclusion that the package contained cocaine. The affidavit also recited Crump's position as Southern Regional Security Manager for Federal Express and the fact that the arrangements made by Lough with Crump for the controlled delivery of the package to San Diego corroborated both Crump's position and his statements regarding the nature of the package. These facts provided a substantial basis for concluding that probable cause existed to believe that the package contained narcotics and that, after a controlled delivery to [petitioner's] house followed by surveillance, those narcotics would be found in that house. * * *
>
> The affidavit also did recite that Lough had opened the package in San Diego, removed some of the powder, and conducted a field test proving the powder to be cocaine. * * * But even if we assume for purposes of argument that Lough's search was unlawful, [petitioners] are not entitled to reversal. Excluding the results of Lough's search, the remaining facts recited in

> the affidavit are sufficient to establish probable cause. The warrant is therefore valid, * * * and the district court did not err in denying the motion to suppress.

The Eighth Circuit in *Jacobsen* reached the opposite conclusion about the search warrant affidavit in that case (82-1167 Pet. App. 8a): "Without the statement that a test indicated the presence of cocaine in the powder, the affidavit does not provide probable cause to believe the Jacobsens possessed cocaine in their home." While we believe that conclusion was erroneous, it turned upon the particular circumstances of that case and creates no conflict with the decision below on any legal issue.

The court of appeals' ruling in this case is plainly correct and does not merit this Court's review. Indeed, petitioners' argument — that the information provided by Crump did not establish probable cause (Pet. 15-24) and that Agent Lough's actions constituted a search that required probable cause and a warrant (Pet. 11-14) — leads to the wholly implausible conclusion that the government was powerless to do anything when it received Crump's information.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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